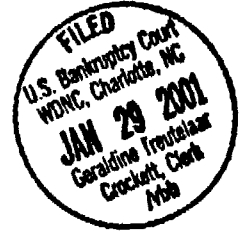


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
WILKESBORO DIVISION



In re:)
) Case No. 00-50829
) Chapter 13
 William C. Barnes, and)
)
 Kendra L. Barnes,)
)
 Debtors.)

~~JAN 29 2001~~ JAN 29 2001

ORDER IMPOSING SANCTIONS FOR VIOLATIONS OF THE AUTOMATIC STAY

This matter came before the Court on January 4, 2001, upon the Debtors' Motion for Sanctions against K & S Auto Sales. Based on the evidence, the Court makes the following:

FINDINGS OF FACT

1. William C. Barnes and Kendra L. Barnes are the debtors in this Chapter 13 bankruptcy case which was filed on July 7, 2000. Their plan was confirmed on August 30, 2000.

2. K & S Auto Sales ("K & S"), the Respondent, is a used car dealership located in Granite Falls, North Carolina. K & S is a sole proprietorship. Ken Hamby is its owner operator.

3. Prior to the bankruptcy, on February 17, 2000, William Barnes purchased a 1992 Honda Accord from K & S. K & S financed that purchase. Both William Barnes and his aunt, Regina Duley, signed the note for the car.

4. By Summer, the Barnes' were getting ready to file bankruptcy. Being in arrears on their car loan, the Barnes were justifiably concerned that K&S would repossess the vehicle. As

the petition was being prepared, around July 5th or July 6th, 2000, the Barnes' requested that their bankruptcy attorney, Carole Tuttle, call K & S and inform it of the Debtors' impending bankruptcy. To this end, Tuttle's secretary, Beth Cline, called K & S and spoke with Hamby. Cline informed Hamby that the Barnes' were about to file a Chapter 13 bankruptcy case. K & S' debt would be listed in the petition as a fully secured claim.

5. The petition was filed on July 7. After obtaining a Chapter 13 case number from the Bankruptcy Court Clerk, Cline called Hamby again and relayed this information. However, Hamby was not moved. During the phone conversation, Hamby told Cline that since Ms. Duley was a co-obligor of the debt, K & S could legally repossess the car. As will be seen, Hamby's understanding of the law was faulty.

6. Thereafter, William Barnes also called K & S and spoke to Hamby's associate. Barnes told the K&S employee that he and his wife had filed Chapter 13 bankruptcy and asked the associate to communicate this message to Hamby.

7. On July 10, 2000, while at work, William Barnes received an urgent phone call from his daughter. A man was at their home and he intended to repossess the Honda. The Barnes' (who work for the same employer) immediately left work and raced home. Near their house, they met and stopped a tow truck and asked the driver if he was looking for their car. The driver

indicated that he was, and that he was working for K & S. The Barnes informed him of their bankruptcy, and he followed them to their residence to obtain verification of this. The Barnes showed the driver a copy of their bankruptcy petition, and thus satisfied, he left without the car.

8. One or two weeks later, on a weekend, K & S' representative repeatedly called the Barnes residence and spoke to the Debtors' children, demanding to know where Mr. Barnes was and where the car was located. That same day, William Barnes returned a phone call from K & S and instructed Hamby to speak to the Barnes' lawyer. Hamby retorted that he wanted "the money, not the car" and that he did not want to speak to Mr. Barnes' lawyer.

9. On an undetermined Saturday in September, a man knocked on the Barnes' door and asked for Regina Duley and William Barnes. The man said that he was looking for the Barnes' car. The man was turned away and left the premises, again without the car.

10. Brian Sheeley is employed by K & S in an "asset recovery" position. He is paid \$50.00 for each car he repossesses for K&S.

11. On a Monday in September, Sheeley arrived at the Barnes' residence and attempted to repossess the Barnes' car. Sheeley got the vehicle started and began to back it down the

Barnes' driveway. Seeing this, William Barnes ran out of his house and jumped into the passenger seat. A fight ensued, which left Sheeley with a bloody nose and William Barnes with a broken hand. All the while, Kendra Barnes was running along beside the vehicle, yelling at Sheeley that they were in bankruptcy and waving a copy of the petition. Being rather occupied at the time, Sheeley did not try to look at it. In the end, the car was stopped, the law summoned, and the County Sheriff's Department came out to the Barnes' residence.

12. In an interesting display of comity between state and federal law, the deputy sheriff chose not to arrest either party. Instead, he deposited Sheeley and Barnes' at the bankruptcy attorney's law office. There it was again confirmed that a Chapter 13 bankruptcy had been filed by the Barnes. Shortly thereafter, Hamby arrived at Tuttle's office. While there, Cline confirmed K&S' address, and gave Hamby a Proof of Claim form to file in the Barnes' Chapter 13 bankruptcy case.

13. Hamby asks the Court to believe that this was the first time that he and K&S were made aware that the Barnes' were in bankruptcy. He says a problem with K&S' mail delivery prevented K&S from receiving mail sent to its physical address, from February, 2000 to December, 2000.

14. The undersigned found the testimony of Cline and the Barnes' more credible than that of Hamby, and believes that

verbal notice of the filing was given to K&S on several occasions before this aborted repo attempt was made.

15. That K&S had prior notice of the bankruptcy is also supported by the case record and the Chapter 13 Trustee's records.

16. Shortly after the Barnes' filing on July 7, the Clerk gave notice to all parties listed on the Debtor's Chapter 13 petition of the Barnes' bankruptcy filing. Both a notice of first meeting of creditors and later an order confirming the Barnes' plan was served. The former specifically advises that the automatic stay is in effect and that collection efforts by creditors are prohibited.

17. During this period of time, the Chapter 13 trustee, Steven Tate, also sent notices to K & S regarding the bankruptcy case.

18. Each of these notices used K&S' street address in Granite Falls, N.C.. However, and as of the hearing date, six months after the fact, none of these notices has ever been returned by the Post Office as undeliverable.

19. Finally, on the day of the repo attempt, Hamby gave Cline K&S's current address. Not coincidentally, the address he supplied was the same street address used in the petition and all of the other notices. Obviously, if K&S was having trouble

getting mail other than by its post office box, Hamby would not have given out its physical address at this point.

20. In the altercation with Sheeley, William Barnes suffered a fracture of his right hand and was in a cast for five to six weeks. Mr. Barnes was unable to work for six weeks. He received disability payments of \$142 per week for five weeks out of the six weeks in which he was unable to work.

21. During the three weeks prior to his injury, Barnes' gross salary averaged \$700.87 per week.

CONCLUSIONS OF LAW

The filing of a Chapter 13 bankruptcy petition prevents "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362 (a)(2). The purpose of the automatic stay is two-fold: First, to prevent creditors from making demands and collection efforts against the economically disadvantaged debtor. Second, the automatic stay fosters creditor democracy and prevents one creditor from gaining an advantage over another creditor when seeking to collect payments from a debtor's limited resources. Budget Service Co. v. Better Homes of Va., 804 F.2d 289, 292 (4th Cir.1986); In re Little, Case No. 00-31168 (Bankr. W.D. N.C. October 5, 2000) (Wooten, J.).

Despite the breadth of the automatic stay, Congress has placed a constraint on its reach. A party must "wilfully"

violate the automatic stay to be sanctioned. 11 U.S.C. § 362

(h). A violation of the automatic stay is willful when a creditor's actions are "intentional and deliberate." Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir.1986).

In the instant matter, the Court finds that K & S had notice of the Barnes' Chapter 13 bankruptcy case but chose to ignore this notice and violate the automatic stay. While Hamby contends that he did not receive notice of the Barnes' bankruptcy filing, the evidence before the court belies this assertion. The Chapter 13 trustee, Steve Tate, sent several mailings concerning the Barnes' bankruptcy case to K & S' physical address and none of these mailings were returned. This fact demonstrates that K & S regularly received notifications regarding the Barnes' bankruptcy case but chose to ignore such notices.

Furthermore, the Court finds that at least five discrete incidents between the Debtors and K & S demonstrates K & S' knowledge of the bankruptcy filing: (1) When Ms. Cline called Hamby, told him of the Barnes' bankruptcy filing, and gave him their case number; (2) When Mr. Barnes called K & S himself and told a K & S associate of the Barnes' bankruptcy filing; (3) When Barnes' informed the K & S repossession associate of their bankruptcy filing after the associate attempted to tow the Barnes' car; (4) When Mr. Barnes returned Mr. Hamby's calls and

told Hamby that he and his wife had filed bankruptcy and that Hamby should speak to Mr. Tuttle; and, (5) When Mr. Sheeley refused to look at the papers Mrs. Barnes showed him and continued to try to drive the Barnes' vehicle away.

Consequently, "[t]here is ample evidence in the record to support the conclusion that [the creditor] knew of the pending petition and intentionally attempted to [continue collection procedures] in spite of it." In re Hamrick, 175 B.R. 890, 892 (W.D.N.C. 1994) (citations omitted); In re Skinner, 90 B.R. 470 (D. Utah 1988) ("once a notice of a bankruptcy is communicated to creditors, either directly or indirectly, the burden is placed on the creditors to decide the parameters of permissible conduct against the debtor.").¹

The fact that K & S breached the peace when it attempted to repossess the Barnes' car further supports the Court's conclusion that K & S wilfully violated the automatic stay. Under North Carolina law, a creditor may use self-help to enforce a security interest in its collateral if it can do so without breaching the peace. Rea v. Universal Credit Corp., 127 S.E.2d 225 (N.C. 1962). Here, Mr. Sheeley's trespass onto the Debtors' real

¹ The Court would reach the same conclusion regardless of whether the evidence indicated that K & S was aware of the Barnes' filing. This is because the filing of a bankruptcy petition spontaneously invokes the automatic stay of Section 362, even if a creditor does not learn of the filing through formal notice. In re Miller, 129 B.R. 68, 70 (D. Md. 1982).

property and use of physical force against the debtor while attempting to remove the vehicle was a flagrant breach of the peace and bolsters the Court's conclusion that K & S' repossession efforts constituted wilful violations of the automatic stay.

Moreover, K & S' conduct cannot be excused because Hamby misunderstood the effect of the automatic stay. Evidence before the Court revealed that Hamby told Ms. Cline that he could repossess the car despite the Barnes' bankruptcy. Hamby believed this because Mr. Barnes' aunt was a co-obligor on the car with Mr. Barnes. In the case of In re Isom, 1998 WL 173204, *3 (Bankr. D. Minn. 1998), the Bankruptcy Court for the District of Minnesota stated that:

ignorance of the law is no excuse. For conduct to be considered "willful" under § 362(h), a deliberate act made with knowledge of the filing of the bankruptcy petition is all that is required; a proper understanding of the Bankruptcy Code or a specific intent to violate the automatic stay is not. A different rule would be unworkable, rendering § 362(h) unenforceable against virtually all except bankruptcy attorneys.

Consequently, Hamby cannot avail himself of his own misunderstanding of the law to excuse his actions.

Upon a showing of a wilful violation of the automatic stay, a debtor "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h)

In the case at bar, Mr. Barnes's actual damages include two components: his medical bills and lost wages. The evidence demonstrates that Mr. Barnes incurred medical bills in the amount of \$897.00 to care for his fractured hand.

Similarly, the evidence reveals that Mr. Barnes missed six weeks of work due to his broken hand. During the three weeks prior to his injury, Mr. Barnes earned \$700.87 in gross wages on average per week. Consequently, Mr. Barnes is entitled to damages of \$4,205.22 for the six weeks of missed work. However, since Mr. Barnes was given a disability check of \$142.00 for five weeks, his total damages for lost wages over the six week period are \$3,495.22. This figure, in addition to the \$897.00 medical bills, results in total actual damages of \$4,392.22.

In addition to actual damages, this case warrants an award of punitive damages for K & S' use of physical force while flagrantly violating the automatic stay. Under § 362 (h), punitive damages are proper in "appropriate circumstances." Generally speaking, punitive damages will be awarded where a willful violation of the stay occurs by way of egregious or vindictive conduct. In re Midkiff, 85 B.R. 467 (Bankr. S.D. Ohio 1988). Here, due to K & S' outrageous conduct, the proper remedy is to strike K & S' secured claim in the Barnes' Chapter 13 plan and to cancel its lien on the Barnes' vehicle. See, e.g., In re Carriqan, 109 B.R. 167, 172 (Bankr. W.D.N.C. 1989) (Hodges,

J.) (penalty for egregious violation of the automatic stay is to strike creditor's secured claim and to cancel its lien).

To this end, K & S is hereby ordered to immediately cancel its lien on the title to the Debtors' 1992 Honda and forward this title directly to the Debtors. If, within a reasonable time, K & S fails to forward to the Debtors' the title to their vehicle free and clear of K & S' lien, the Debtors are entitled to apply directly with the North Carolina Department of Motor Vehicles for the title free and clear of K & S' lien. Upon presentation of a certified copy of this Order, and any applicable fee for processing the paperwork, The North Carolina Department of Motor Vehicles is ordered to cancel K&S' lien and to issue a new clean title to Barnes.

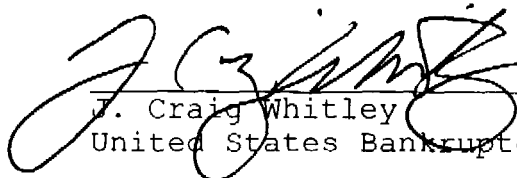
Moreover, Debtors are entitled to the attorney fees for prosecuting this action. The Debtors' attorney shall have fifteen days (15) to file an affidavit with the Court stating the attorney fees and K & S' counsel will have fifteen (15) days to respond to the affidavit. The Court will thereafter enter a supplemental Order setting the appropriate attorney fees.

Since K & S is a sole proprietorship, with Hamby as President, Hamby and K & S are jointly and severally liable for the damages ordered.

Wherefore, based on the Findings of Fact and Conclusions of Law, the Court hereby orders that:

1. Debtors' Motion for Sanctions for Violation of the Automatic Stay is hereby granted;
2. Debtors are entitled to actual damages in the amount of \$4,392.22, with K & S Auto Sales and Ken Hamby jointly and severally liable;
3. Debtors are entitled to attorney fees in an amount to be determined by the court upon affidavit; and,
4. K & S's secured claim is hereby stricken, its lien on the Barnes' vehicle is canceled, and K & S shall forward the title to the Debtors' vehicle directly to the Barnes' free and clear of K & S' lien.
5. If K & S fails to forward to the Debtors' the title to their vehicle free and clear of K & S' lien, the Debtors are entitled to apply directly with the North Carolina Department of Motor Vehicles for the title free and clear of K & S' lien. Upon presentation of a certified copy of this Order, and any applicable fee for processing the paperwork, The North Carolina Department of Motor Vehicles shall cancel K&S' lien and to issue a new clean title to Barnes.

SO ORDERED.


J. Craig Whitley
United States Bankruptcy Judge